(8)

No. 85-1963

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

TYLER PIPE INDUSTRIES, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Appellee.

On Appeal From the Supreme Court of Washington

MOTION TO DISMISS OR AFFIRM

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MOTION

Appellee State of Washington, Department of Revenue, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington State Supreme Court, on the ground that the questions presented are so unsubstantial as to require no further argument.

STATEMENT OF THE CASE

Appellant, Tyler Pipe Industries, Inc. (TPI), challenges the imposition of Washington's wholesaling business and occupation (B&O) tax on its sales to Washington customers. We begin by describing Washington's tax sys-

tem in issue here, TPI's operations in Washington, and the contested tax assessment.

I. WASHINGTON'S B&O TAX

Washington's B&O tax is levied "for the act or privilege of engaging in business activities." Wash. Rev. Code § 82.04.220. J.S. G-2. This case involves the tax on the activity of selling at wholesale. The wholesaling B&O tax is imposed upon "every person * * * engaging within this state in the business of making sales at wholesale." Wash. Rev. Code § 82.04.270. J.S. G-4. The measure of the tax is the gross proceeds of sales, and the tax rate is .0044. *Id.*

Washington also imposes a tax upon the activity of manufacturing in this state. Wash. Rev. Code § 82.04.240. J.S. G-3. The imposition of the manufacturing B&O tax is limited by the so-called "multiple activities exemption," Wash. Rev. Code § 82.04.440. J.S. G-5. According to this provision, persons "taxable under * * * [wholesaling] shall not be taxable under [manufacturing] * * * with respect to * * * manufacturing of the products so sold."

The end result of these statutes is that *all* products sold at wholesale in Washington are subject to wholesaling B&O tax regardless of where they were manufactured. Also, all products sold at wholesale or manufactured in Washington are subject to one B&O tax, either wholesaling or manufacturing—but not both.

II. TPI'S OPERATIONS IN WASHINGTON

TPI markets plumbing pipes and related products, which are manufactured outside Washington by one or more of TPI's subsidiary corporations. The products are sold to TPI, which itself does no manufacturing. J.S. 4; RP 38.[1]

[1]References to the record before the Supreme Court of Washington are as follows: "FF" means the numbered Findings of Fact, J.S. Appendix B-8 through B-12. "RP" refers to the verbatim Report of Proceedings, the transcription of the trial. "CP" refers to the Clerk's Papers. "Ex." refers to a trial exhibit.

A. **TPI's Marketing System**

TPI's marketing division consists of two sales departments, DWV (Drainage, Waste, Vent) and Utilities. These departments do their local marketing across the nation through sales representatives, who are either employees or independent contractors. For most of Washington State, TPI does its marketing through two Seattle independent contractors. FF 2, 6, and 12, J.S. B-8, B-9, and B-11.

One of those contractors, Ashe and Jones, handles all sales functions in its territory pertaining to TPI products, except those relative to TPI subsidiary Wade, Inc.[2] Ashe and Jones, which also represents other companies with non-competing product lines, has four employees who sell for TPI. During the relevant period, Ashe and Jones was involved in $22,345,110 worth of TPI Washington sales. Ashe and Jones receives a commission for every sale made in its territory to a TPI customer, even if the customer first directly contacts TPI rather than the sales representative about the sale. FF 3 and 6, J.S. B-8 and B-9; RP 281-82, 285; Ex. 17.[3]

The functions of Washington independent contractor Ashe and Jones are essentially identical to those of the employee salesmen who represent TPI in certain other parts of the country. There are no significant functional differences between these two types of TPI sales representatives. When Ashe and Jones personnel are asked by TPI to do something, they do it. They are TPI's agents. FF 12, J.S. B-11; RP 258, 305, 327.

[2]The DWV sales department includes Wade, Inc., a wholly-owned subsidiary of TPI which markets auxiliary items. Wade has its own Washington-based sales representative, Mechanical Agents, which maintains an inventory of Wade products (owned by TPI/Wade) in its warehouse in Seattle. FF 4, J.S. B-9. Mechanical Agents employs four sales people who engage in numerous Washington activities on Wade's behalf. RP 340-45. Although TPI originally contested the taxes measured by Wade sales, it abandoned that portion of its claim. CP 1-5; FF 1, J.S. B-8.

[3]In accordance with TPI custom, Ashe and Jones represents both the DWV and Utilities departments, and its commissions are calculated on the basis of both DWV and Utilities sales. RP 245, 248, and 262.

The sales representatives' functions can be broken down into three general categories, which we will now discuss in turn: (1) market information-gathering, (2) order solicitation and processing, and (3) market development and maintenance.

B. **Market Information-Gathering**

The sales representatives communicate frequently with TPI itself, TPI's customers, and even the customers of those customers, obtaining valuable information and relaying it back to TPI. Ashe and Jones personnel talk by telephone with TPI management in Texas, both DWV and Utilities, about a dozen times a week, providing information to both departments. RP 188-90, 255-56, 277-80; Exs. 13, 25.

Virtually all information received by TPI concerning the Washington market for its products is communicated orally from the sales representatives. Such information includes vital feedback about existing and potential new customers, product performance, competing products, pricing, market conditions and trends, existing and upcoming construction projects, customer financial reliability, and other critical information of a local nature concerning TPI's Washington market. Such information, provided on a regular, timely basis, is necessary to keeping TPI competitive in the marketplace. FF 8, J.S. B-9 and B-10.

C. **Order Solicitation and Processing**

TPI's sales representatives regularly call on the trade and solicit specific orders from wholesalers for TPI's products. They also regularly receive specific orders and transmit them to TPI. During the relevant period, the two Washington sales representatives actually received and conveyed to TPI 67% of its total orders from Washington customers. Ashe and Jones transmitted no Utility orders but 96% of the remaining non-Wade orders. FF 9, J.S. B-10; Ex. 49.

D. **Market Development and Maintenance**

In addition to soliciting orders as such, Ashe and Jones personnel spend a significant part of their time making "secondary calls" to persuade Washington architects and engineers, and contractors (the customers of TPI's customers), to specify and use TPI products in their projects. The representative does this for both the DWV and Utilities departments. FF 10, J.S. B-10; RP 287-89.

Even after an order has been obtained and placed, the sales representative has a follow-up role. If a Washington customer has a problem with non-conforming goods, shortages, or the amount of an invoice, that customer generally contacts TPI's local sales representative, who will participate in investigating and handling any adjustment. These contacts include inquiries about products sold by the Utilities department. FF 10, J.S. B-10; RP 169, 251, 302-03.

Finally, the sales representatives perform other important services for TPI. The sales representative is required by TPI's sales representation agreement to serve as the first line evaluator of a potential new customer's financial responsibility. Sales representatives also occasionally make inquiries for TPI regarding late payments. When there is a problem in this regard in its territory, Ashe and Jones will know about it and may become involved. FF 10, J.S. B-10 and B-11; RP 295-97; Ex. 41, ¶4.

In sum, TPI's sales representatives have long-established and valuable relationships with its customers. Through their sales contacts, the representatives maintain and improve TPI's name recognition, market share, and individual customer relations. They are involved in *all* TPI Washington sales transactions either actively or at least in the sense of being present, aware of the transactions, and available to assist if necessary. The sales representatives afford to TPI's customers the "presence" of TPI as they stand by at all times to assist the customers, encourage product sales, and promote TPI's goodwill. FF 7 and 11, J.S. B-9 and B-11; RP 162.

III. CONTESTED TAXES

TPI seeks a refund of wholesaling B&O taxes it has paid on its wholesale sales delivered to Washington customers, for the period from January 1, 1976 through September 30, 1980, in the total amount (including post-assessment interest) of $130,010. FF 1 and 15, J.S. B-8 and B-12.

Neither TPI nor any subsidiary paid to any other state any tax measured in whole or in part by sales in Washington, or income resulting from those sales, during the relevant period. FF 17, J.S. B-12.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CLEARLY CORRECT.

I. GENERAL MOTORS AND STANDARD PRESSED STEEL DISPOSE OF TPI'S CLAIM.

TPI claims that Washington's wholesaling B&O tax assessed here violates the Commerce Clause, Art. I, § 8, cl. 3, and the Due Process Clause, Amend. XIV, § 1, of the U.S. Constitution.

To be valid under the Commerce Clause a state's tax must satisfy four requirements: (1) there must be a sufficient connection or nexus between the interstate activities and the taxing state; (2) the tax must not discriminate against interstate commerce; (3) the tax must be fairly apportioned; and (4) the tax must be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

The Due Process Clause imposes two requirements: (1) there must be a minimal connection between the interstate activities and the taxing state; and (2) there must be a rational relationship between the income attributed to the state and the intrastate values of the enterprise. *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 436-37 (1980). The Court has recognized that the Commerce Clause and the Due Process Clause tests in the area of state taxation are similar. *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois,* 386 U.S. 753, 756 (1967).

Washington's wholesaling B&O tax has repeatedly been upheld by this Court under both the Commerce Clause and Due Process Clause. *See General Motors Corp. v. Washington,* 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Department of Revenue of Washington,* 419 U.S. 560 (1975); and *Chicago Bridge & Iron Co. v. Department of Revenue,* 98 Wn.2d 814, 659 P.2d 463 (1983), *appeal dism'd,* 464 U.S. 1013 (1983). These decisions dispose of TPI's claim. The decision below, again sustaining the wholesaling B&O tax, correctly follows these cases.

It is clear that TPI considers these cases to be no longer controlling. J.S. 7. Why they should be so discarded, however, is far from clear. These cases have not been overruled and none of the Court's more recent decisions, including *Armco, Inc. v. Hardesty,* 467 U.S. 638 (1984), cast doubt on their continuing validity. Indeed, on the day the Court noted probable jurisdiction in *Armco* it dismissed the taxpayer's appeal in *Chicago Bridge & Iron. See Armco,* 464 U.S. 1016 (1983) and *Chicago Bridge & Iron,* 464 U.S. 1013 (1983).

We will establish that this appeal does not present a substantial federal question by discussing in some detail the Commerce Clause and Due Process Clause requirements. We begin, as TPI has, with the discrimination prong of the Commerce Clause test.

II. WASHINGTON'S WHOLESALING B&O TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

A. The Wholesaling B&O Tax Does Not Provide a Direct Commercial Advantage to Local Business.

TPI alleges that Washington's wholesaling B&O tax discriminates against interstate commerce.[4] J.S. 7-12. This precise claim was raised by the taxpayers in *General Motors*, 377 U.S. at 460 (Goldberg, J., dissenting). The majority in *General Motors* was not sufficiently troubled by the question to even discuss it.[5] This was for good reason, as the Court's subsequent decisions show.

TPI's claim is based primarily on the assertion that the wholesaling B&O tax discriminates in the same way as the taxes struck down in *Armco* and *Maryland v. Louisiana*, 451 U.S. 725 (1981). J.S. 9. This assertion is incorrect. It stems from a fundamental misunderstanding of the Commerce Clause discrimination test that underlies both decisions.

1. *The discrimination test under the Commerce Clause.*

The discrimination test under the Commerce Clause embodies two basic principles. First, the Commerce Clause prohibits a state from imposing a tax "which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977). The Court has identified two kinds of taxes that violate this first principle.

The first improper tax *discourages* interstate commerce by using discriminatory taxes "to assure that residents trade only in intrastate commerce." *Boston Stock Exchange*, 429 U.S. at 334-35. Thus, a state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco*, 467 U.S. at 642. This is the rationale of the majority in *Armco*.

[4]The same tax is also challenged in *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 715 P.2d 128 (1986), *appeal docketed*, No. 85-2006 (June 3, 1986).

[5]This claim was raised again in the taxpayer's appeal of the Washington Supreme Court's decision in *Chicago Bridge & Iron*. This Court concluded that this claim did not present a substantial federal question.

The second kind of tax that violates the first principle of the discrimination test uses "discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State * * * *" *Boston Stock Exchange*, 429 U.S. at 334-35. In this sense, such a tax improperly *encourages* interstate commerce. Based on this test the Court has struck down taxes which allow an interstate business to reduce its tax burden, in the taxing state, by increasing its business activities in that state.

The tax at issue in *Maryland v. Louisiana* illustrates such an improper tax. *Maryland v. Louisiana* concerned Louisiana's "first use tax." A credit to the first use tax made it possible for a business to reduce its Louisiana tax burden, *e.g.*, from $70 to $35, if it did additional business in Louisiana. 451 U.S. at 757 (n. 28). The Court struck down the first use tax because it improperly encouraged an interstate business to increase its business in Louisiana in violation of the first principle of the Commerce Clause test.

The second principle of the discrimination test is the converse of the first: a state is not prohibited from structuring its tax system "to encourage the growth and development of intrastate commerce and industry" or "to compete with other States for a share of interstate commerce" so long as it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 336-37. *Accord, Armco*, 467 U.S. at 645-46.

Thus, states are free to use taxes to encourage growth and compete for commerce so long as the taxes do not (1) tax a transaction more heavily when it crosses state lines or (2) allow an interstate business to reduce its tax burden, in the taxing state, by engaging in more business activities there.

2. *The wholesaling B&O tax is distinguishable from those struck down in Armco and Maryland v. Louisiana.*

With these principles of the discrimination test in

mind it is easy to see why the Court's decisions in *Armco* and *Maryland v. Louisiana* have no application to the wholesaling B&O tax.

TPI argues that Washington's wholesaling tax has the same infirmity as the wholesaling tax in *Armco*. J.S. 9. TPI's argument ignores the reasoning of the *Armco* Court. The Court invalidated West Virginia's wholesaling tax because it applied only "[i]f the property was manufactured out of the State and imported for sale." 467 U.S. at 642. In West Virginia no wholesaling tax was imposed if property was both manufactured and sold in the state.

This is not true in Washington. The wholesaling B&O tax applies to all sales in this state, without regard to where the goods are manufactured. Thus, Washington's wholesaling B&O tax does not discriminate by taxing a wholesale sale more heavily when it crosses a state line than when it occurs entirely within Washington.

TPI also argues that the wholesaling B&O tax discriminates because, it claims, the effect of Washington's multiple activities exemption, Wash. Rev. Code § 82.04.440, is the same as the credit struck down in *Maryland v. Louisiana*. J.S. 10-11. In fact, the effect of the credit in *Maryland v. Louisiana* and the multiple activities exemption are completely different.

Unlike the credit struck down in *Maryland v. Louisiana,* the multiple activities exemption does not permit an out-of-state manufacturer to reduce its Washington tax by increasing its business in this state. A business that manufactures $1,000 of goods elsewhere and sells them in Washington at wholesale pays $4.40 in wholesaling B&O tax ($1,000 x .0044). If that business moved its manufacturing operation into Washington it would pay precisely the same wholesaling tax on the sale of $1,000 of goods both manufactured and sold here. Thus, Washington's wholesaling B&O tax does not discriminate by assuring that interstate businesses direct their commerce into Washington.

3. *TPI's claim is really based on alleged infirmities in the manufacturing B&O tax.*

TPI argues that Washington's wholesaling tax is discriminatory, because under the multiple activities exemption, Wash. Rev. Code § 82.04.440, a business manufacturing and wholesaling in Washington pays only wholesaling B&O tax. But a business manufacturing elsewhere may be subject to two taxes imposed by two different states on its manufacturing and wholesaling functions. This result, TPI asserts, is a function of Washington's tax system. J.S. 8-9. However, the possibility of two taxes on an out-of-state business is not a function of Washington's multiple activites exemption. Another state could impose a manufacturing tax on products manufactured there even if Washington taxed both manufacturing and wholesaling (*i.e.*, if there were no multiple activities exemption), or if Washington imposed no manufacturing tax at all—on anyone.

Nor is such a result constitutionally infirm. The possibility—or actuality—of another state's tax on the manufacture of goods sold in a destination state does not of itself make the destination state's tax discriminatory, as the Court acknowledged in *Armco*. 467 U.S. at 645.

Accordingly, TPI must challenge the wholesaling tax because it is part of Washington's B&O tax system. By reason of the multiple activities exemption, that system is allegedly discriminatory since it imposes the manufacturing tax on those selling outside Washington and exempts, from that tax, those who sell within the state.

Thus, the nub of TPI's argument is reached: the wholesaling B&O tax should be struck down because the *manufacturing* B&O tax is discriminatory. TPI justifies this odd result by citing *Maryland v. Louisiana* for the proposition that a state tax must be "considered in conjunction with other provisions of a State's tax scheme." J.S. 10.

Obviously, we do not agree that the manufacturing

B&O tax discriminates against interstate commerce.[6] However, even if it were so considered, TPI's conclusion about the corresponding invalidity of the wholesaling B&O tax it must pay would not follow from this result. If the Court concludes that a particular tax discriminates, based on its operation with other taxes in the state's tax system, it does not follow that every tax in that system must be struck down because of its possible relationship to the discriminatory tax.

Two examples should suffice. In *Maryland v. Louisiana* the Court struck down Louisiana's "first use tax." The Court gave no indication that the Louisiana severance tax, which was paid by every business that severed natural resources, was similarly invalid simply because the first use tax could be credited against it. In *Armco* the Court struck down West Virginia's wholesaling tax. Once again, the Court gave no indication that the state's manufacturing tax, which applied to all manufacturing in the state, was invalid.

Similarly, in this case, even if the manufacturing B&O tax were presumed discriminatory (and we contend it is not), that conclusion would not require striking down the wholesaling B&O tax which applies to all wholesale sales in Washington. Therefore, even if the manufacturing tax is regarded as discriminatory, TPI has no complaint.

B. The Concept of Internal Consistency Does Not Invalidate The Wholesaling B&O Tax As Applied to TPI.

TPI makes one additional argument. It contends that the court below erred because it did not apply the concept of "internal consistency" to invalidate the wholesaling B&O tax. J.S. 12. This argument fails for two reasons. First, the Court in *Armco* did not adopt an internal consistency test as part of its discrimination analysis. Second,

[6]In *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 715 P.2d 128 (1986), *appeal docketed*, No. 85-2006 (June 3, 1986), some Washington manufacturers do challenge the imposition of Washington's manufacturing B&O tax upon them.

even if such a test were adopted, it would not invalidate the wholesaling B&O tax as applied to TPI; for TPI is not a manufacturer.

1. *Armco did not graft the concept of internal consistency onto the discrimination prong of the Commerce Clause test.*

Essentially, TPI argues that *Armco* grafted the concept of internal consistency onto the discrimination prong of the Commerce Clause test. TPI's argument amounts to this: even though the wholesaling B&O tax is imposed on *all* sellers, the concept of internal consistency renders that tax discriminatory. Thus, TPI would assert that under *Armco* the West Virginia *manufacturing* tax, which applied to all manufacturers, would have been held discriminatory. Yet there is nothing in the Court's opinion in *Armco* to indicate that both West Virginia's manufacturing and wholesaling taxes were infirm.

The Court's discussion of internal consistency in *Armco* actually was in response to West Virginia's argument that Armco be required "to prove actual discriminatory impact." 467 U.S. at 644. The Court rejected this argument. According to the majority, a showing of "actual discriminatory impact" by reason of another state's taxes

> is not the test. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983), the Court noted that a tax must have "what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade.

467 U.S. at 644. The internal consistency test in *Container Corp. v. Franchise Tax Board* does not require one to prove actual discriminatory impact by pointing to another state's tax system.

In *Armco*, the Court stated: "A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce." 467 U.S. at 644. The "simi-

lar rule" is not the concept of internal consistency. It is not a rule which, as TPI asserts, allows the taxpayer to fashion a contention of facial discrimination when it is in fact subject to the same wholesaling tax imposed on all sellers engaged in wholesaling. J.S. 12.

Rather, the "similar rule" is the rule that actual discriminatory impact need not be shown where a tax discriminates on its face. The rule that actual discriminatory impact need not be shown is necessary because "[a]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States * * * *" *Armco,* 467 U.S. at 644-45.

Thus, the majority did not graft the concept of "internal consistency" onto the discrimination prong of the Commerce Clause test.

Both before and after its decision in *Armco* the Court has specifically refused to apply an internal consistency type test to the discrimination prong of the Commerce Clause. For example, in *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939) the Court considered a challenge to California's use tax. If the California sales and use taxes were placed in another state, goods purchased in that other state and brought into California would bear two taxes—retail sales tax and use tax; for the California use tax allowed no credit or other offset for another state's sales tax. Goods purchased in California and used in California, however, would bear only one tax—retail sales tax. Thus, internal consistency was the basis of the taxpayer's challenge.

If lack of internal consistency is a form of unconstitutional discrimination the Court should have invalidated California's use tax. It did not. Instead, the Court ruled that "this is not a discrimination in the law." 306 U.S. at 172. The Court in *Southern Pacific v. Gallagher* specifically refused to assume that another state had applied its sales tax because "[i]t will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is

compelled to pay again in the state of destination.' " 306 U.S. at 172 (quoting *Henneford v. Silas Mason Co.,* 300 U.S. 577, 587 (1937)).

In *Williams v. Vermont,* ___ U.S. ___, 105 S.Ct. 2465 (1985) the Court specifically affirmed its earlier ruling in *Southern Pacific v. Gallagher. Williams* invalidated Vermont's use tax on motor vehicles. The Vermont sales and use tax lacked internal consistency. A nonresident would pay two taxes—the sales tax in the state of purchase and Vermont's use tax. A Vermont resident, buying in Vermont, would pay only Vermont sales tax.

The Court ultimately struck down the tax because the distinction between residents and nonresidents violated the Equal Protection Clause. 105 S.Ct. at 2472. However, the Court specifically adhered to *Southern Pacific v. Gallagher* and refused to apply an internal consistency type test. 105 S.Ct. at 2471.

Williams is especially significant because it was decided after *Armco* and *Armco* was specifically brought to the Court's attention. The pages of the Brief for Appellant (31-35) referred to by the Court, at 105 S.Ct. 2471, discuss its earlier opinion in *Armco.*

Southern Pacific and *Williams* confirm that the Court has not grafted the internal consistency test onto the discrimination prong of the Commerce Clause. Thus, the concept of internal consistency does not invalidate Washington's wholesaling B&O tax.

2. *TPI is not a manufacturer and cannot suffer discrimination from a tax system that lacks internal consistency.*

Even if the Court grafted internal consistency onto the discrimination prong of the Commerce Clause, the wholesaling B&O tax in this case is valid. Washington taxes, as applied to TPI, do not lack internal consistency. This is because TPI is not a manufacturer. It engages in only one business activity—selling. TPI admits that all of

the products it sells are manufactured by separate corporations which are its subsidiaries. J.S. 4.

Thus, even if another state had both a manufacturing and wholesaling tax, TPI would pay only wholesaling tax. It would never pay a manufacturing tax. In addition, there is no possibility of overlap between the wholesaling taxes of two states. A tax on selling can only be applied by the state of destination, be it Washington or another state. *Evco v. Jones*, 409 U.S. 91, 93 (1972).

Thus, Washington's wholesaling B&O tax, as applied to TPI, is internally consistent because TPI can only be subject to one wholesaling tax—regardless of whether it sells in intrastate or interstate commerce.

III. WASHINGTON'S SELLING TAX IS FAIRLY APPORTIONED AND FAIRLY RELATED TO SERVICES PROVIDED BY THE STATE.

TPI claims that Washington's wholesaling B&O tax is not fairly apportioned.[7] J.S. 12-13. In doing so, TPI addresses neither the manner in which the wholesaling B&O tax is apportioned nor the decisions of this Court approving that apportionment method.

The wholesaling B&O tax is apportioned through the use of allocation. Washington allocates to itself only the gross proceeds of wholesale sales which are consummated by delivery within Washington. Thus, Washington does not use a three-factor formula, *i.e.*, sales, payroll, and property, to divide up a taxpayer's gross income for the purpose of determining the base of the wholesaling B&O tax. But there is no constitutional requirement that Washington's method be broadened into this type of formulary apportionment.

[7]TPI also claims in the same heading of its discussion that the Washington tax is not fairly related to services provided by the state, but does not support this claim with any argument. Since the measure of Washington's tax is related exactly to TPI's sales activities in Washington, as required by *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620-29 (1981), the lack of any actual argument appropriately forecloses that issue.

Washington's use of allocation to apportion its wholesaling B&O tax was specifically approved by this Court in *Standard Pressed Steel*, 419 U.S. at 564, where the Court stated that the wholesaling B&O tax was " 'apportioned exactly to the activities taxed.' "

Subsequently, in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978) the Court relied upon *Standard Pressed Steel* in upholding Iowa's single factor apportionment formula. The Court stated, at 437 U.S. 280:

> In *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560, the Court sustained a tax on the entire gross receipts from sales made by the taxpayer into Washington State. Because receipts from sales made to States other than Washington were not included in Standard Pressed Steel's taxable gross receipts, the Court concluded that the tax was " 'apportioned exactly to the activities taxed.' "

The result in *Standard Pressed Steel* makes complete sense. The purpose of the apportionment prong of the Commerce Clause is to prevent multiple tax burdens. In this case, no multiple burden is possible because the Court has previously ruled that only the state of destination has jurisdiction to tax a sale. The Court has struck down taxes imposed on sales by states other than the delivery state. *Evco v. Jones*, 409 U.S. at 93; *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311 (1938).[8]

IV. THE IN-STATE ACTIVITIES PERFORMED HERE CREATE A SUFFICIENT TAXING NEXUS.

TPI claims that there is an insufficient nexus, for Due Process and Commerce Clause purposes, between its ac-

[8]For this reason, TPI's assertion, at J.S. 13, that if other states were to adopt Washington's B&O tax "* * * the same gross receipts would be taxed two, three or more times," is simply incorrect. One state, we would agree, might use gross proceeds as the measure for a tax on manufacturing, and another state, *i.e.*, the market state, might use those same gross proceeds as the measure for a tax on selling. But *Armco* makes it clear that this is perfectly permissible. *Armco*, 467 U.S. at 645.

tivities and the State of Washington. This claim involves two arguments. First, TPI says that the activities themselves are insufficient, claiming that it has no employees, but only independent representatives with limited responsibilities, located in Washington. J.S. 14-15. Second, TPI claims that at least the sales of its Utilities department are dissociated from its other Washington activities and nontaxable. J.S. 15-16.

We will show that the facts in the record establish a more than sufficient nexus under this Court's decisions. TPI's dissociation claim represents merely a further attempt to disregard or retry the facts properly found below.

A. The In-State Activities Performed On TPI's Behalf Create a Sufficient Nexus For a Gross Receipts Tax.

TPI claims to have demonstrated that "the activities allegedly creating the required nexus were not of the same degree" as those performed in *Standard Pressed Steel.* J.S. 14. That claim simply ignores the functions which the courts below found to be performed on TPI's behalf by its local sales representatives. When these activities are reviewed, there can be no serious question of their sufficiency for nexus purposes.

In *Standard Pressed Steel,* the taxpayer was an out-of-state manufacturer with one employee, Martinson, residing in Washington. His primary duty was to consult with the Boeing Company regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of the fasteners after delivery. Orders and payments were sent directly to the taxpayer, not to Martinson. 419 U.S. at 561. Rejecting an argument that the in-state activities were too "thin and inconsequential," this Court unanimously concluded that "Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between [the taxpayer] and Boeing." 419 U.S. at 562.

Applying the same functional analysis here reveals that the activities performed by Washington residents on behalf of TPI are similar and even more extensive. TPI's Washington sales representative is similarly involved in gathering and conveying vital market information, resolving problems, and maintaining goodwill and rapport with customer personnel.

However, Ashe and Jones also does even more. TPI's representative actually goes out in the field and solicits, and processes, many orders. (Martinson, in contrast, "did not take orders." 419 U.S. at 561.) Ashe and Jones employs four sales people who, in addition to soliciting orders from TPI's numerous customers, also spend part of their time making "secondary calls" to persuade the customers of those customers to specify and use TPI products in their projects. Standard Pressed Steel had only one Washington resident, Martinson, calling only at the customer level, essentially on one customer.

Thus, the activities of TPI's sales representative here, involving market information-gathering, solicitation and processing of most orders, and related services aimed at developing and maintaining TPI's Washington market, provide a much broader nexus base than in *Standard Pressed Steel.* TPI's assertions to the contrary[9] amount to a bald attempt to have this Court redetermine the facts, even though the Washington Supreme Court, after reviewing the entire record, concluded that there was "substantial evidence to support each fact" found by the trial court. J.S. A-6. This case does not present any reason for such an

[9]For example, the Washington courts found that TPI's Washington sales representatives convey virtually all the information TPI receives concerning the Washington market, information which "is necessary to keeping Tyler Pipe competitive in the marketplace." FF 8, J.S. B-9 and B-10; Ex. 24. TPI, though, without even acknowledging its payment to its representatives of commissions on *all* Washington sales, asserts that "it was not necessary to utilize an independent sales representative" to make sales in Washington. J.S. 15. Such a self-serving protestation, of the needlessness of services for which TPI paid valuable consideration, cannot be any more convincing in this Court than it was in the courts below.

exercise by this Court.[10]

Whereas *Standard Pressed Steel* supports the finding of nexus here, the cases cited by TPI, J.S. at 14, are all readily distinguishable because none forbade taxation of transactions involving resident agents of the taxpayer.[11] In *National Bellas Hess*, the taxpayer did not have in the taxing state "any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders" or otherwise act on its behalf. 386 U.S. at 754. Similarly, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328 (1944) involved a taxpayer whose only connection with the taxing state came through solicitation by traveling salesmen domiciled elsewhere.

In sum, the activities of TPI's Washington representative create a sufficient nexus for imposition of a gross receipts tax.[12] TPI's argument to the contrary could only succeed if none of these activities are attributable to TPI itself. Although TPI does not clearly so argue, we will briefly dispose of any such suggestion.

[10]This Court has indicated in recent actions that it will not retry nexus issues where the court below has reached a reasonable result consonant with the Court's own rulings. *See Illinois Commercial Men's Association v. State Board of Equalization*, 34 Cal.3d 839, 671 P.2d 349 (1983), *appeal dism'd*, 466 U.S. 933 (1984) (*Standard Pressed Steel* followed in finding sufficient nexus); *City of Phoenix v. West Publishing Co.*, 148 Ariz. 31, 712 P.2d 944 (1985), *cert. den.* 54 L.W. 3841 (1986) (*Standard Pressed Steel* distinguished in finding insufficient nexus).

[11]Accordingly, we do not rely, as TPI infers, on the lesser nexus standard that suffices to impose use tax collection duties. J.S. 13-14. *Cf. National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977).

[12]TPI claims that these activities would be insufficient for imposition of a net income tax, under 15 U.S.C. §§ 381 *et seq.*, and that the Court should apply the same result as a constitutional rule even if the cited statute itself is only applicable to a net income tax. J.S. 14-15 (n.2). Given the facts showing that the representatives' activities here go far beyond mere "solicitation of orders," TPI's application of this statute is clearly incorrect. *Clairol, Inc. v. Kingsley*, 109 N.J. Super. 22, 262 A.2d 213 (1970), *affirmed*, 57 N.J. 199, 270 A.2d 702 (1970), *appeal dism'd*, 402 U.S. 902 (1971). Moreover, there is no basis for this Court to expand that statute to other activities, and to a gross receipts tax, when Congress itself has not seen fit to do so, in light of *General Motors* and *Complete Auto Transit* or otherwise.

B. That TPI Designates Its Local Sales Representatives As Independent Contractors Rather Than Employees Lacks Constitutional Significance.

As a factual matter, it is undisputed that the sales functions of TPI's Washington sales representative are essentially identical to those of the employee salesmen who represent TPI elsewhere. There are no significant differences in how this representative and those employees solicit and process orders or otherwise "call on the trade." FF 12, J.S. B-11.

As a matter of law, there also is no difference in the tax consequences. According to *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960), it does not matter for nexus purposes that a taxpayer's "salesmen" are not regular employees devoting full time to its service:

> [W]e conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as "independent" neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into [the taxing state].

As this Court further explained, "To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance." *Id.*

Since the "contractual tagging of the salesman" is without constitutional significance in the use tax context, inescapably it is equally so for a gross receipts tax. TPI has never suggested any reason why its own subjective decision to designate sales personnel as independent contractors rather than salesmen, without any difference in their functions, should mean different tax consequences. Obviously such an artificial distinction would lead to the same "stampede of tax avoidance" regardless of the type of tax.

In any event, such an argument by TPI, based on its representative's independent contractor status, is foreclosed in this gross receipts tax context by *Illinois Com-*

mercial Men's Association v. State Board of Equalization, 34 Cal.3d 839, 671 P.2d 349 (1983), *appeal dism'd*, 466 U.S. 933 (1984). *Illinois Commercial* specifically found a sufficient nexus for imposition of a gross premiums tax on out-of-state insurance companies on the basis of the activities of in-state independent contractors. Those contractors were essentially the insurers' only link to California, a link limited to the contractors' investigation and (for one company) settling of no more than ten percent of filed claims. 671 P.2d at 354. Following *Scripto*, the California Court held that "the circumstance that investigation and/or settlement services" on behalf of the companies "were performed by independent contractors is of little constitutional significance. The undeniable fact is that they were acting as agents" of the taxpayers. 671 P.2d at 355.

This Court's subsequent dismissal of the appeal in that case, for want of a substantial federal question, constitutes a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

C. TPI Cannot Dissociate Its Utilities Department Sales.

TPI claims that the one-third of its sales attributable to the Utilities department "occurred with no participation whatsoever by the independent sales representative," and that under *Norton Company v. Department of Revenue of Illinois*, 340 U.S. 534 (1951) these are not taxable. J.S. 15-16. This claim represents yet another invitation to this Court to either ignore the facts found below or retry them. It also misapplies *Norton*.

Contrary to TPI's factual assertions, the record clearly establishes that the sales representative's activities made possible the realization and continuance of valuable contractual relations of TPI's Utilities department specifically. As we showed above, Ashe and Jones provides the same market information-gathering and market develop-

ment and maintenance services for Utilities as for DWV, with insignificant variations. TPI itself assigns these functions for both departments to this same representative, and pays that representative commissions on the total amount of all DWV and Utilities sales. The only significant distinguishing characteristic of Utilities sales, *i.e.*, that the representative did not physically handle the orders, actually marks a *similarity* with *Standard Pressed Steel*, and thus certainly is no basis for a different result.[13]

Given these facts, *Norton* does not authorize dissociation of Utilities department sales. *Norton* forbade taxation only on transactions consummated directly with the taxpayer's out-of-state home office, presumably without any involvement of its local office personnel. 340 U.S. at 539. The Court's observation there that "no solicitors work the territory," 340 U.S. at 537, quickly distinguishes the present case, where Ashe and Jones is performing and being paid for numerous services which promote Utilities department sales.

[13]In any event, it is TPI's burden to show that the operations of its Utilities department are "dissociated from the local business and interstate in nature." *General Motors*, 377 U.S. at 441. Having itself tied the DWV and Utilities sales activities together in one local representative, TPI has been unable to carry this burden.

CONCLUSION

For the foregoing reasons, the questions raised by this appeal are so unsubstantial as to require no further argument. Accordingly, this appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

DATED this 16th day of July, 1986.

Respectfully submitted,

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